No. (1)

Supreme Court, U.S.
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In The
Supreme Court of the United States

STEVE G. WEIL,

Pro-Se Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMENDED PETITION FOR WRIT OF CERTIORARI

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Petitioner

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QUESTIONS PRESENTED

1. Does district court and 11th Circuit refusal in a matter of first impression to opine on a serious jurisdictional issue which divested court authority, because it involves the child of one of its own judges, conflicts of interest and separation of powers doctrine, violates Weil's right to due process, deny him access to the courts and meaningful opportunity to have the jurisdictional issue decided by a neutral court?

2. Is the executive branch exempt from the provisions of 28 U.S.C. §458 et. seq. 1999, when the language is clear, plain, unambiguous and prohibits any blood relative of any sitting judge from being appointed, employed or performing any duty in any courthouse in which that relative/judge is on the bench, as a conflict of interest and violative of separation of powers, when the relative here is his AUSA daughter and the statute has no savings clause?

3. Is a secretly hand-altered indictment of four different versions suppressed for five years, none of the changes made by the court or told to the court, jury or defense, divest court jurisdiction when the changes and the suppression is uncontroverted by the government, is uncovered during §2255 proceedings, ignored by district court, refused to address issue by appeals court because suppressor is AUSA relative of one of its judges, violate due process and equal treatment guarantees of 5th and 14th amendments?

4. Does the disappearance of an exculpatory #302 from FBI files, the admitted alteration of AUSA videotape shown to jury, uncontroverted witness and evidence tampering, deficient jury instructions,

uncrossed testimonial hearsay warrant issuance of a certificate of appealability and is violative of Brady, deprivation of due process and highly prejudicial individually and cumulatively?

5. When Weil was sentenced for money laundering on the basis of an amount not charged in the indictment, for which the jury did not find any guilt whatsoever, no less beyond reasonable doubt, then court relies on false, inaccurate basis of its uncontroverted misconception of AUSA altered videotape, to enhance the sentence, does it violate the 6th Amend., Apprendi and Blakely, and was counsel ineffective for failing to raise it at sentencing?

6. Did the 11th Circuit err in not granting COA, not hearing case on its merits and in refusing to address the issues of jurisdiction, separation of powers and conflicts of interest, the suppressed indictments and other prosecutorial misconduct by AUSA daughter of one of the judges of its court, and was counsel ineffective for failing to ever raise any of these issues?

7. Should Judge Marcus have been mandatorily recused pursuant to 28 U.S.C. § 455(a), (b)(1), (b)(3) and/or (b)(4)?

LIST OF PARTIES

The parties to the proceeding in the lower tribunal are:

STEVE WEIL - Petitioner **pro se**

YALE GARBER - Co-defendant

.United States of America

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PETITION FOR A WRIT OF CERTIORARI

Petitioner requests writ of certiorari issue to review judgment of U.S. Court of Appeals for 11th Circuit denial of Certificate of §2255 Appealability, refusal to opine on serious jurisdictional questions, Doctrine of Separation of Powers and divestiture of court authority and judicial conflicts of interest pursuant to JUDICIAL ANTI NEPOTISM ACT, all of great public importance in denying free access to the courts and due process.

OPINIONS BELOW

Decisions of the Court of Appeals and District Court are unpublished, but are reproduced in APPENDIX at App. 1 to 8.

JURISDICTION

The Court of Appeals entered its judgment on July 2, 2004. Petitioner now invokes the jurisdiction of this court pursuant to 28 U.S.C. §1254, **is timely filed and** Supreme Court Rule 13.1. The appellate court had jurisdiction pursuant to 28 U.S.C. 1291.

PROVISIONS OF LAW

U.S.CONSTITUTION 5, 6, 14 Amendments; Doctrine of Separation of Powers

DUE PROCESS CLAUSES 5, 14 Amendments

6th Amendment right to effective counsel and fair trial

28 U.S.C. §458 *et. seq.* 1999 (a)(1) and (b)(1).

§458 Relative of justice or judge ineligible to appointment

"No person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court."

28 U.S.C. §455(a) and (b)(1), (b)(3) and (b)(4)

Pervasive Bias Doctrine

5 U.S.C. §§3110, 7301, 7310, 7513 - CODE OF ETHICS FOR GOVERNMENT EMPLOYEES

STATEMENT OF THE CASE

Petitioner is 69 years of age, worked as a documented FBI C-I for 20 years, without pay although offered to him on many occasions. In this case he dutifully reported all the actors to his FBI handler, who did a #302 Memorandum on his information, which agent so testified at trial. When the case was under investigation, FBI gave the AUSA access to his confidential file, after which #302 could no longer be found. The AUSA was the daughter of the sitting judge after whom the Miami Federal Courthouse is named, former chief judge, now senior active status judge. All the judges in that courthouse know she is the child of one of their colleagues and fellow jurists, treat her accordingly, with the same benevolence and collegiality as they do her father-judge, giving her every benefit in deference to Judge King, who sits on 11th Cir. Court of Appeals by designation and who is equally as well known to all those judges

28 U.S.C. §458 *et. seq.* §1999 is a strict prohibition against any relative of any sitting judge from performing any duty in the same judicial district, no less the same courthouse as that judge. Weil discovered §458 doing his pro-se §2255, claims it divested court jurisdiction. It was ignored by district court and appeal court, who refused to opine on it, the appellate judge who denied COA sat on the Miami bench with Judge King, is a close family and personal friend, who would not rule adverse to the Kings by issuing a COA.

Weil moved to recuse Hon. Circuit Judge Stanley Marcus as a conflict of interest, his having denied Weil's direct appeal voicing his opinion then and now on COA pursuant to Liteky v. U.S., 510 U.S. 540 (1994). Weil filed appropriate affidavit of Judge Marcus being a family friend, colleague, associate and fellow jurist of Judge King, protecting his AUSA child whom he has known since childhood, as an actual conflict of interest, appearance of impropriety and actual impropriety, Liteky and 28 U.S.C. §§ 455(a) and (b) mandate recusal. Judge Marcus while not denying any of Weil's allegations, denied motion for COA (App. 1) and refused to recuse himself (App-2). Weil filed Motion for Reconsideration denied by Judge Marcus (App. 3), who insisted on staying on the case, refused COA, his antagonism showing through, making fair judgment impossible. In that opinion he erroneously states, contrary to the dictates of Liteky : (App. 3)

"Appellant has failed to offer any evidence of judicial bias against him, which cannot be based on the mere fact that a colleague's daughter prosecuted appellant's criminal case."

It is an admittance of "collegiality", but omits his denial as personal family friend of both AUSA King and her judge/father as Weil's filed affidavit specifically states, which affidavit **is evidence**. Liteky automatically presumes prejudice, as does §458 which seeks to prevent it by prohibiting any relative of any judge from practicing law or performing any duty in any court in the same judicial district. Weil filed for rehearing en banc, the clerk of court refused to file it, "held" it for over a month, then returned one of the 15 copies to Weil, even though he was in compliance, timely, within the purview of 11th Cir. R. 35-3 in every respect. (App. 4); 28 U.S.C. § 455(a), (b)(1) and (b)(3), which requires recusal if the judge "... expressed an opinion concerning the merits of the particular case in controversy". He did so in denying the original direct appeal, his special relationship with the King family with AUSA King and judge King individually and his interest in protecting his AUSA child from an adverse decision, all weighs heavily on recusal. He refused. §455(b)(4). The pervasive bias doctrine should apply, exceeds appearance of impropriety, Weil burdened with a bias and prejudice he could not overcome, Judge Marcus refusing to allow 11th Cir. to hear it, blocking review on its merits, although there is a plethora of uncontroverted allegations and evidence in Weil's favor, both compelling and overwhelmingly so, adversely affecting conduct of AUSA King.

Weil's §2255 pleading with specificity identified numerous instances of serious errors and misconduct any of which individually satisfy COA requirements, cumulatively far exceed them, uncontroverted trial and counsel errors abound, satisfying prongs of Strickland v. Washington, 466 U.S. 668 (1984) and Slack v.

McDaniel, 529 U.S. 473, 484 (2000). COA should have issued, as review of the record will prove, §2255 granted, the verdict reversed, yet appeal court is prevented from even reviewing it, jurisdictional and Separation of Powers issues of major public and national importance, sidestepped rather than opined upon by both district and appeal courts.

REASONS FOR GRANTING THE WRIT and COA

This is divided into two sections: first individually identified issues summarized; then LEGAL ARGUMENT of QUESTIONS PRESENTED involving each of these issues. Weil, pro-se, discovered and raised issues on § 2255 that escaped ineffective counsel at trial and on appeal, which Weil has identified and developed the record, **uncontroverted,** includes:

1) **Evidence Tampering** - mysterious disappearance of the exculpatory #302 which would have exonerated Weil completely, which FBI agent Toale who prepared it needed in order to refresh his poor memory for details, but testified he did prepare an extensive memo of Weil's report. Brady v. Maryland, 373 U.S. 83 (1963); Strickler v. Green, 572 U.S. 262 (1999); Banks v. Dretke, 124 S. Ct. 1256 (2004). AUSA agents on search warrant confiscated several key items Weil had preserved as evidence from his home, did not return any of them, depriving his use of them at trial is conversion; agents altered tapes and videotape, entire audio portion erased on video tape.

2) **Witness Tampering** - a) AUSA witness Joe Mortellaro, barred from courtroom by judge pursuant to witness exclusion rule, contacted several defense witnesses during trial to dissuade their

testimony. It is clearly established federal law that adversarial witnesses may not contact defense witnesses for any purpose. 18 U.S.C. §§ 1503, 1510, 1512. One day before Weil's main witness Bodden was to testify, he was flying to Miami to meet counsel in the evening to review his testimony, Mortellaro called him, convinced him to meet with him first, not to tell counsel and took him to AUSA office, where they intimidated, coerced, convinced him not to testify, not to make his meeting and to leave Miami or risk indictment himself, making a private deal with Bodden who was unrepresented, not telling defense counsel or court of it. Bodden did not testify, court refused to admit his previously given affidavit, Weil lost main witness. Initially both AUSA and Mortellaro denied any knowledge of it, when facts became known counsel refused to call either of them to the stand stating he did not want to incur wrath of Judge King before whom he still had to practice, by putting his pregnant AUSA daughter on the stand. Mortellaro has since been charged with perjury in a matter relating to this case, trial judge refused §2255 discovery motion to take his deposition even though he is now a cooperating witness and has agreed to tell the truth about the tampering and the motion was unopposed, district court protecting AUSA in its refusal.

b) Mario "Adamo" Avegnano was a paid DEA, Italian C-I who it was falsely represented spoke no English, respondent gave him $300,000 the year prior to trial, then refused to call him and hid him from subpoena. The entire case commenced on his false report, his uncrossed testimonial hearsay was tape recorded and played to jury, defense could not confront him, AUSA refused to reveal his location, he

played a key role in the entrapment scheme, court refused missing witness instruction, instructed the jury they must accept his uncertified, uncrossed taped testimonial as "primary evidence" which ineffective counsel failed to object to. Mario's taped conversation was done by him knowing it was being taped and that he would never have to testify or be examined on it. Violates the 14th Amend., Confrontation Clause. Crawford v. Washington, 124 S. Ct. ___ (March 18, 2004).

c) Joe Mortellaro was IRS/CID agent, with all semblance of credibility at trial, who altered tapes, tampered with evidence and witnesses, perjured himself, was charged and now cooperating with investigation, was tainted but jury was unaware, giving credence to his false statements, affecting verdict outcome.

d) Elyahu Matalon AUSA key witness who perjured himself at trial, adversely affecting Weil with whom he never met, spoke to, dealt with, but was the victim of a spillover affect of false testimony regarding role of co-defendant Garber. After trial he became a fugitive, was extradited back to U.S. but court denied §2255 Motion to take his deposition. Before he fled, after learning of illegal AUSA tactics, he tipped off Weil as to altered tapes in an extortion attempt for $50,000, which Weil refused and reported to court and law enforcement. AUSA returned his passport, reduced his bond and aided in his escape, exactly as Weil had told authorities she was doing, now confirmed by Mortellaro. Court uninterested since AUSA is child of one of the court's judges.

3) **Evidence Suppression** - in addition to suppressing #302 and agent Toale's original notes of Weil having reported the names to him and that Weil was working on the case, the suppression of all evidentiary items confiscated from Weil is in same category, as are the original unaltered suppressed tapes and the 4 suppressed versions of indictment.

a) Court erred in suppressing Weil's hand written notes from which #302 was prepared, as being next best evidence in absence of missing original #302. Def. Ex. 8, 9, court refused to admit at trial.

b) Court suppressed defense subpoena of Brad Goldstein, ex-newspaper reporter whom Weil had told everything to on condition it not print until he had all the actors arrested. This third party, independent testimony would bear directly on the non-concealment by Weil, a key element required for money laundering conviction and to Weil's non criminal intent, Weil told eight other people including two Miami Dade Detectives, all of whom his attorney failed and neglected to call at trial.

c) Four different versions of the indictment AUSA hid for 5 years, all hand altered, changed money amounts that read differently, all in different handwriting, no two the same. In respondent's over a month late Answer to Weil's co-defendant's §2255 (Yale Garber) it annexed as an exhibit copy of indictment which was different than one provided at arraignment in many respects. Discovery found four separate versions, including one to jury, none of changes told to court or defense, done surreptitiously, unilaterally by AUSA, presenting jury non disclosed hand alterations is not a "true bill," divests jurisdiction.

d) Court suppressed Bodden affidavit given in advance of trial, which in his absence due to respondent's witness tampering, was the next best evidence and jury had a right to consider. Court would not even allow counsel to show them to Weil for identification when testifying, nor Bodden's partner Leo From's affidavit similarly given who did not appear to testify after tampering incident. Affidavit DE-280.

e) Agents tampered with a key evidentiary video-tape, conversations unfavorable to AUSA case and exculpatory to defense were completely erased. Court allowed its admittance, shown to jury, neither Weil nor Garber were in it, only Matalon and agents. It was highly prejudicial, dark shadowy with Matalon and case agent "annotating" for the jury what they "said was being said", having suppressed the discussions by erasure. Court at sentencing incredibly used that video as basis to wrongfully enhance both defendants, emphatically stating it saw and heard Garber in it. In its instructions it told jury it should use that video as to both Weil and Garber. This must also be considered under 1) Evidence Tampering as well as in 3) Evidence Suppression. Altered video should have been inadmissible at trial.

4) **Deficient Jury Instructions** - a) The above charge erroneous to use an inadmissible video, audio absent and tampered with, neither defendant in it, highly prejudicial and inflammatory, with AUSA witness who has startling resemblance to Garber, so much so they could have been brothers, stuffing his pockets with cash taken from a pile of currency on a table at agents undercover office.

b) Beyond belief, Court instructed jury that they should use the uncrossed testimonial taped hearsay of AUSA witness "Mario" as "primary evidence" ignoring AUSA hid him from subpoena.

c) Gave jury incorrect definition of reasonable doubt of innocence, told them they could find "any" doubt of guilt to convict, rather than beyond reasonable doubt as required, confused jury.

d) Told jury they may "infer" as to guilt, omitted all Weil's substantial non-concealment acts.

e) Gave jury incorrect definition of money laundering statute 28 USC § 1956(a)(3)(B)

f) Told jury it was not necessary to prove every element of the crime contrary to Supreme Court precedent.

g) Refused missing witness jury instruction for Mario who AUSA refused to call or provide his then location so he could be subpoenaed

h) No instruction on $10,000 extremely prejudicial seizure before jury of Weil's own preserved evidence, AUSA screaming, "it is drug money."

i) Bodden whom AUSA witness tampered and intimidated into not testifying also deserved to have jury given missing witness charge.

j) No missing witness charge for reporter Goldstein whose subpoena was quashed, who was spoken about extensively at trial, jury must have questioned why he was never called as defense witness.

k) Weil's non-criminal intent non-concealment acts his reporting same to FBI required a dominant jury instruction and is a primary public authority mitigitating factor having told at least eight people of the activities of all the actors involved.

5) **Beholden, Bias Court** – Trial judge was recent appointment to bench. Judge King, Senior Judge was looked to for guidance, assistance, for his opinions, his daughter AUSA case prosecutor. Judge Seitz, just admitted to the exclusive judicial fraternity, treated AUSA King as a favorite child praising her and stating she cherished and respected AUSA Kings' interpretation of justice, even though court was aware of all evidence, witness and evidence tampering, including missing FBI #302 **after** AUSA was given access to Weil's confidential FBI/C-I file.

6) **Ineffective Assistance of Counsel** – Weil counsel was very conflicted, refused to aggressively pursue defense openings, such as witness and evidence tampering, afraid to anger Judge King and incur wrath of his fellow jurists by confronting pregnant AUSA King in court over prosecutorial misconduct in the above identified incidents to which she was part. Counsel stated that he could not and would not jeopardize his own legal practice since he had to practice before judge King. Multiple other counsel errors exist in record. Counsel was also very ill for entire trial, record is replete with court comments regarding his health, popping pills, constantly drinking black coffee to stay awake. Court commented it believed he wanted "out of the case", that his enthusiasm for the case was "wanning" and that it saw a "flipped attitude," among other things. Counsel

failed to call 14 witnesses, one he did call, who stood by for two days, then he forgot to put on. Counsel failed to subpoena Bodden or From when they came to his office to deliver their own affidavits. He said they were voluntary witnesses, did not need subpoena, he could always introduce their affidavits but court refused to admit them after witness tampering and they did not testify; only requested two instructions.

7) **Prosecutorial Misconduct** - four different versions of hand altered Indictment, done secretly, unilaterally by AUSA without ever disclosing to defense, court or jury, giving defense one version, court/jury another, no two versions identical, in different hand writings, different changes and money laundering amounts, discovered inadvertently five years after the fact; mysterious disappearance of FBI #302 after AUSA was given file, key document, exculpatory proof of non-criminal intent; AUSA had obligation to notify defense and court if she wanted to interview one of Weil's witnesses on eve of his scheduled testimony, affording counsel no opportunity to attend is witness tampering; AUSA made a private deal with Bodden not to testify, never told court, jury or defense of it, Weil only discovered details after trial, jury and defense had a right to know details; AUSA directed her witness Mortellaro to contact defense witnesses, she knew or should have known one witness may not contact another witness for any reason, no less to deter testimony or appearance; AUSA violation of 28 USC § 458 *et. seq.* 1999 caused grand jury to be improperly impaneled, she being an improper representative of U.S. in that courthouse and judicial district where her father was a judge; perjured herself to court in saying she did not know what

happened to Bodden or why he did not show at trial or for his meeting with counsel to review his scheduled testimony; assisted Matalon in escape when he became a liability having learned illegal things going on in the case; obstructed justice by introducing altered tapes into evidence; conspired with agents to alter the tapes and suppress true indictment, not providing the audio absent, altered videotape on discovery, but sprung it as a surprise at trial; suppressed true indictment.

AUSA produced transcripts of the tapes which defense used for 16 months trial preparation. One day before trial commenced, AUSA unhappy with her own transcripts, delivered a second set with substantial language changes that she and her agents wanted in it. The first set was certified, the second **uncertified**, strenuously objected to by defense as not being notified in advance, even though AUSA had it in the works for some time, not telling the court or defense. Counsel was ill prepared, could not have its own expert examine the language changes against the tapes which were unknown to be altered at that time. Court permitted admittance of both sets to jury, each set bulky, burdensome, jurors continually dropping them on the floor, unable to balance two sets, read them both while listening to the tapes and making notes. Each book about 11 x 14, 5 inches thick, 3 ring binders, 7 volumes, each book these approximate dimensions. Jurors did not know which was certified, which was not. Nor did jurors know both sets were AUSA's, no clarifying jury instruction given.

AUSA provided cash to her agents, Weil preserved $10,000 in his C-I role to admit into evidence, but AUSA and her agent simultaneously leaped up and

screamed "it is drug money" and the court allowed them to seize it in front of the jury, knowing it was not. It was a premeditated act, caused such turmoil that the jury had to be excused, but not before agent took possession of the money, put it in his jacket, patting his pocket and gave jurors a "thumbs up" and a big smile. This event was the defining act of bad faith, unclean hands and had the effect of being permanently ingrained upon jurors, court never admonishing this judge's daughter for misconduct and prejudice caused Weil, nor did court charge jury on this very important trial incident. It required a dominant instruction that the money was government funds, but none was given. Defense was never able to recover from the adverse, prejudicial affects on jury of this incident.

8) **Sentencing** - Court used incorrect Sentencing Guideline, §1956(a)(3)**(c)** rather than §1956(a)(3)**(B)**, which carries a lower "otherwise" base level, as charged in the indictment. Court enhanced both defendants based on its misperception that it saw and heard Garber in the altered video, when he was not there, not proven to a jury on amounts and on Counts not charged against Weil in the indictment. Weil was charged with Counts 1-3, Garber with 1-6, Weil sentenced on counts 1-6, Weil denied acceptance of responsibility credit for just his charged counts, court refusing to credit him. He never denied what he did, just went to trial to tell "why" he did it - for FBI - but court refused public authority affirmative defense, which counsel did not tell him until after trial had begun. Counsel falsely told him mens rea was just as good a defense, but it was not. Jury prevented from hearing valid affirmative defense theory, which facts and Weil's role in this case was consistent with public

authority defense. Weil told at least eight people, therefore the main concealment element of money laundering was not present, not proved, not given to jury as an instruction; non-concealment charge not requested by counsel and not considered at sentencing. At Garber sentencing, AUSA stood mute, allowed court to err, emphatic it saw and heard Garber in videotape, AUSA knew it to be untrue, failed to correct court, enhancing Garber, then Weil wrongfully. Apprendi v. New Jersey, 520 U.S. 446 (2000): Blakely v. Washington, 542 U.S. ___ (2004); 6th Amend.

QUESTIONS PRESENTED

I. Does Weil's Sentence Violate Apprendi, Blakely, 6th Amend., 11th Circuit Exceeding its authority, failing to give mandated deference in an unreasonable application of Supreme Court precedent?

Indictment limits the amount of money for jury's consideration, sentencing judge is not free to make separate determination in order to reach facts not presented and proven to jury. Weil was charged Counts 1-3, total of $165,000; Garber Counts 1-6 for $425,000; based upon misperception of video, court sentenced both defendants on $425,000, even though Weil was not charged with this amount in indictment. Sentenced Oct. 6, 2000 after Apprendi decision, raised in direct appeal and thus preserved and raised on §2255, completely ignored by lower courts, Weil also citing Blakely. Moreover, one may not be convicted of something not charged in indictment. Stirone v. U.S., 361 U.S. 212 (1960). Weil was enhanced in order for court to exceed $200,000 threshold on money laundering severity scale, illegally increasing his base

level and then enhancing him, AUSA mute as court inaccurately, incredibly stating its misconception:

> As to the knowledge of the drug proceeds, I find that the enhancement there is appropriate. The evidence is clear that Mr. Garber was at (their offices) . . . in addition to all the other evidence—it is undisputed that, based upon the **videotape,** that Mr. Garber was present at the warehouse where the discussion pertained to the impact that the air crash that occurred the day he was at the warehouse would have on Mr. Garber, the undercover agent's involvement in his facilitating the movement of drugs at the airport. . . **This is probably the most clear cut discussion throughout the course. (DE-296-7** Garber Sentencing Transcript) (emphasis added)

Garber never testified, the above a legal impossibility, record reflects neither he nor Weil were in altered, audio-absent video, Weil claims was inadmissible, only agents and AUSA witness present, shown to jury over counsel's objection while witness was on stand, agent "annotating", leading witness in saying what they "said was being said" on the silent video, all with court consent. It was extremely prejudicial, court and jury easily mistaken Garber for witness who had striking resemblance to him. It was dark, shadowy, witness stuffing his pockets with cash taken from piles on a table. There was no drug related conversations whatsoever in Weil's presence. Court falsely relied upon above to enhance both Garber and

Weil, AUSA allowing it to deliberately err. It also used above to exceed the money laundering severity scale, surpassing $350,000 level to further increase the sentence, when indictment only charged Weil with $165,000, court erroneously using $425,000 as sentence basis. Court reliance upon above amount in first sentencing Garber, then Weil.

Court may not rely upon inaccurate sentencing information. Witte v. U.S., 515 U.S. 389, 399-401 (1995) Nor may it convict on charges not brought in the indictment against Weil, Stirone, supra; Dunn v. U.S., 442 U.S. 100 (1979). Court erroneous determination unlawfully increased Weil sentence Glover v. U.S., 531 U.S. 198 (2001). Court used wrong Sentencing Guideline 18 USC §1956(a)(3)**(c)**, rather then §1956(a)(3)**(B)** which Guideline instructs court to use "otherwise" provision with lesser base of 20, court used 23 instead. Multiple sentencing errors established prejudice for 6th Amend., purposes, imposing "exceptional sentence"-upon an elderly, very infirm petitioner, unproven to any jury, not charged in an indictment, Weil serving an illegal sentence. Nor did he receive acceptance of responsibility deduction, although it is uncontested he accepted it, just went to trial to tell why he did it in pursuit of his C-I role, counsel withheld from him that court denied affirmative public authority defense, denied application of U.S.S.G. 2X1.1 and downward departure, Weil with only one failing kidney, immune complex disease, degenerative osteo arthritis and other infirmities at 69 years old, with a life expectancy of 70 years.

Judicial use of erroneous findings to enhance Weil's sentence violates 6th amend. right to a jury trial and no presumption of correctness can be given to such incorrect holdings, not charged nor proven to a jury. Using $425,00 amount illegally boosted his maximum sentence. Crime of money laundering is about concealment, absent here, proper guideline is 19-27 months, was sentenced to 83 months, has wrongfully served over four years already.

II. Do Hand Altered, 4 Versions of Suppressed Indictment Divest Court Jurisdiction?

AUSA secretly hand altered 4 different versions of indictment, none of changes told to court, jury or defense, uncovered inadvertently during §2255 proceedings, suppressed for 5 years, district court uninterested, appeals court refusing to address clear issue because suppressor is AUSA child of one of its own judges, violates Separation of Powers and 5, 14 Amend, due process and equal treatment guarantees of Const. A "special relationship" exists between this AUSA and the courts, denied Weil free access to the criminal court system, detached, independent judiciary.

It is clearly established that an AUSA may not unilaterally alter an indictment surreptitiously without court consent, as only a court may in certain instances do so, with notification to all parties and jury, undetected by ineffective counsel, renders indictment void, divests jurisdiction. U.S. v. Providence Journal Co., 485 U.S. 693 (1988); Bank of Nova Scotia v. U.SA, 87 U.S. 250 (1988). Suppression violates Brady, Strickler, Banks, supra. AUSA had non discretionary obligation to disclose/provide copies of all hand

altered versions, as it may not be changed at AUSA whim to suit herself. It becomes not a "true bill," divests jurisdiction., 28 USC § 458 violation increases prejudice, are inextricably intertwined.

III. Does Violation of 28 USC §458 *et. seq.* 1999 Preclude Exemption of Executive Branch?

The plain, clear, unambiguous language of the above statute, having no "savings clause" prohibits any blood relative of any sitting judge from being appointed, employed or from performing any duty in any courthouse or judicial district in which that judge is on the bench, provides "No person shall…"

Here the AUSA is the daughter of the former Chief Judge in Miami, now senior active status, sitting judge, the Federal Courthouse bears his name, who sits on 11th Cir. Court of Appeals by designation, both well known to all judges in both courts, none of which will opine adversely to his daughter, appellate court refusing to consider the mistakes of the district court, denied COA. Weil claims her presence commencing with her improper appointment to act as representative of U.S. in this case, divested jurisdiction. 28 USC § 458 *et. seq.* 1999.

Her appearance before the grand jury as improperly appointed representative of government, caused the grand jury to be illegally impaneled, in addition to the above indictment changes in content, requires Pervasive Bias Doctrine to be applied. Arizona v. Fulimante, 499 U.S. 299 (1991). It applies to each court below, each out of deference, respect, loyalty and judicial collegiality, gave her every advantage, favoritism, protectionism that was undeserved,

prejudicial to petitioner. Both she and her father very well known to all justices in both courts below, all refusing to hear this jurisdictional issue of great public concern, denying Weil free access to the courts, even though it is an issue of first impression for 11th Cir. Choosing to ignore the issue is contrary to 11th Cir. own precedent to fulfill its obligations and provide statutory interpretation, abandoning its mandate.

> "A federal court not only has the power, but also the obligation at any time to inquire into jurisdiction whenever the possibility that jurisdiction does not exist arises." Fitzgerald v. Seaboard Sys-R.R., 760 F2d 1249-50 (11th Cir. 1985).

Although incumbent upon appellate court to hear jurisdictional matters, owing a clear non discretionary obligation to Weil to opine, it chose to abdicate its traditional role, denied COA. It is clear district court lacked subject jurisdiction to hear this case. Chemical and Atomic Workers Int. Union v. Missouri, 361 U.S. 363 (1960); Mallardo v. U.S. District Court, 490 U.S. 296, 309 (1989); Heckler v. Ringer, 466 U.S. 602, 615 (1984). This court must ask why 11th Cir. refused to opine on such a clear, plain, language of statutory construction, if not for bias and policy of protectionism. It also is violative of Separation of Powers Doctrine, Pervasive Bias Doctrine applicable. Between suppression of indictments and violation of this statute, there should be no question as to the constitutional illegality of the grand jury, trial and now appeal, it being impossible for Weil to find an independent, neutral court that will even consider the matter, a denial of court access. Rather than receiving specific generosity of Haines v.

Kerner, 404 U.S. 519 (1972) this Court instructed lower courts to give **pro-se** petitioners, he has been completely denied it by all courts, favoring a judge's daughter over a manifest injustice; district court incredibly opined AUSA and executive branch are completely exempt from statute that was specifically enacted and directed to it, is a contradiction and "clearly erroneous." Appx. 27 - #7

IV. Do Grossly Deficient Jury Instructions and Improper Definition of Reasonable Doubt Mandate Reversal?

Court told jury they can find **any doubt** of guilt to convict, rather than beyond reasonable doubt as required, confused jury, told them they may **infer guilt,** shifting burden to Weil to prove his innocence rather than U.S. to prove guilt; gave incorrect definition of 18 USC §1956(a)(3)(**B**) which says "Whoever with the intent", defense was mens rea, does not say whoever with the "knowledge" as the court instructed; no missing witness charges for 2 tampered with witnesses, one whom AUSA/agents hid from subpoena, refused to disclose Mario's location and intimidated, coerced and convinced Weil's key witness from testifying at all, making a private deal with him not to one day before his scheduled appearance (Bodden), getting him not to meet with defense counsel the previous evening to review his testimony; the court wrongfully quashing defense subpoena of Brad Goldstein, an ex-newspaper reporter to whom Weil revealed the names, acts and goals of all parties, bearing on Weil's non criminal intent and lack of concealment element; court told jury to use as "primary evidence" uncrossed, missing witness Mario's tapes and AUSA's two versions of

transcripts. Uncrossed testimonial hearsay tapes barred by 14th Amend. Confrontation Clause, also a 6th Amend, violation as held in Crawford, supra, 6th Amend, bars admittance of the tapes; counsel requested Mario missing witness charge, denied by court, but none requested by ineffective counsel for tampered witness or excluded reporter; no charge on AUSA/agent illegal seizure of $10,000 Weil evidence in open court just as it was being admitted into evidence, causing a major courtroom furor, AUSA/ agent screaming "it is drug money" as court allowed them to seize it, a dominant instruction needed; court told jury "not every element of the crime need be proven" clearly erroneous and prejudicial. Francis v. Franklin, 417 U.S. 307 (1985). No instruction on mysteriously missing FBI exculpatory #302, discovered missing **after** AUSA was given access to the file and on other crucial evidence agents confiscated from Weil's home, never returned to defense for use at trial. All of above **uncontroverted**, almost unheard of, cumulative bias doctrine applies. Brady, Banks, Strickler, supra.

Appellate court abandoned its "primary duty" to review on the merits and opine, even if it's results are contrary to the family interests of one of its colleagues, uncomfortable but necessary in pursuit of interests of justice. The Supreme Court never considered itself bound by a prior decision when a subsequent case brings jurisdictional issues before it, U.S. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984); Hagans v. Levine, 415 U.S. 528 (1974). Yet appeals court refused, jurisdictional issues here rests on inextricably intertwined Separation of Powers Doctrine and the irrefutable existence of a "special relationship" between the courts and the family of this

AUSA, depriving Weil free access to neutral, detached, independent, impartial courts. Hampton v. Hobbs, 106 F.3d 1281 (6th Cir 1997); U.S. v. Rowe, 106 F.3d 1226 (9th Cir 1997). The courts completely ignoring outlandishly defective jury instructions, so glaring as to cause a manifest injustice, not even finding any of the "issues debatable among jurists of reason," is symptomatic that something is amiss in this case §458 enacted to prevent. 28 USC § 458.

No reasonable jury properly instructed could have found guilt beyond reasonable doubt, Sullivan v. Louisiana, 508 U.S. 275 (1993), instructions here so flawed as to be overwhelmingly so. There is also a nexus between such grossly deficient instructions and ineffective counsel allowing it to occur.

V. Did Ineffective Assistance of Counsel Violate 6th Amend. Guarantee?

The above nexus is clear in the record ,Weil counsel so ill for entire length of trial, at one point the court asked him if he wanted "out of this case", told him that it saw a "flipped attitude", counsel constantly drinking black coffee to stay awake and popping pills, Weil had 14 missing witnesses counsel either failed to subpoena, forgot to call or just did not bother to call in an important criminal trial where every witness could add to the defense, surpassing prongs of Strickland v. Washington, 466 U.S. 668 (1984). Counsel openly admits his illness, says he is not his usual self, that he is exhausted and fatigued, record replete with such colloquy, court continually stating it is concerned with his health. At one point he was unable to examine defense own witness, his assistant who was not a trial lawyer and only present to help with the file exhibits,

was forced to take the witness while counsel put his head down on the table, closed his eyes to rest. None of the issues Weil has raised here were raised by ineffective counsel. One subpoenaed witness regarding non-concealment, non-criminal intent stood by for two full days, counsel forgot to call him he was in such a stupor, important witness lost.

Counsel refused to aggressively pursue AUSA prosecutorial misconduct, telling Weil and Garber that he was afraid to upset Judge King's pregnant daughter, as he still had to practice before him and he could not afford to have her "whispering in her father's ear." He also feared incurring the wrath of her father's fellow jurists if he did so, jeopardizing his own legal practice, clearly conflicted, putting his own interests before that of his client. Allowing the witness and evidence tampering to proceed without impeaching AUSA as he was obligated to do, compromised defense. In §2255 Weil identified with specificity 60 separate acts of deficient counsel performance, allowing AUSA to reap the fruits of its poisonous tree. Wong Sun v U.S., 371 U.S. 471 (1963).

AUSA/agents/cooperating witness Matalon made an agreement to withhold their activities from Yale Garber, the tapes reveal "Don' t Tell Yale" which they adhered to. Yet counsel failed to bring this to jury's attention at trial or on summation, to court's attention at sentencing when it held Garber responsible for all acts he had no knowledge of and then enhanced Weil for these nonexistent acts of Garber, reaching $425,000 level. Counsel's silence constitutes ineffective trial and sentencing deficiencies, also mute while court made numerous sentencing errors. See Petition pg. 16.

Counsel only requested two jury instructions, inadequate when one looks at all the issues apparent here, which Weil a non-lawyer has excavated. Garber's testimony was required to corroborate that of Weil's. His own counsel told him that AUSA had not proved her case, that there was no time remaining and it was unnecessary for him to testify even though he insisted on doing so, refusing to put him on stand. Weil told counsel to subpoena him, just as he would do with any other person. He refused without express permission of Garber's counsel, since they were former law partners and still good friends, putting his own relationship with Garber counsel before the interests of Weil. Garber would have also testified to the "Don't Tell Yale" and his lack of knowledge of agent's other transactions, bringing it to jury attention which both counsel failed to do. By depriving Garber of his right to testify on his own behalf, Weil was deprived of a key witness. It contributed to unjust verdict and inability to prove Weil's innocence.

Counsel failed to file Rule 35(a) within 7 days to correct illegal sentence, and correct the court of not having credited acceptance of responsibility deduction; wrongful enhancement; sentenced on counts and amounts not even charged in indictment; court using wrong sentencing Guideline of §1956(a)(3)(**c**) rather than §1956(a)(3)(**B**) "otherwise" Guideline with a lower base of 17 rather than 20 which was used.

After conviction but pre-sentence, Weil uncovered a plot to kill an AUSA and a ATF agent in an unrelated case, told his counsel who said he would take care of it, that Weil would receive a Rule 35(b) substantial assistance reduction in sentence. The next

day counsel visited Weil in FDC awaiting bond, told him all arrangements had been made, advised him to tell U.S. Marshal everything he knew and not to worry about it. When the U.S. Marshal came his counsel was present, reiterating this, encouraging Weil to cooperate-Weil did. The plan was foiled, two lives saved, AUSA refused to file Rule 35(b) because counsel went to U.S. Marshal instead of to her first, as per her protocol. He should have had it memorialized and executed by Marshall's office or AUSA first, before he advised Weil to provide the information.

Court commented that counsel's enthusiasm for the case was "wanning". It was correct, he was in no condition to continue keeping awake on a steady flow of large black coffee and pills clouding his judgment and performance, jeopardized Weil's freedom, refusing to pursue a vigorous defense in fear of offending Judge King's daughter and banishment from his courthouse, Weil never receiving any substantial assistance credit per advice of counsel. Other errors too numerous to cite here, but which would be subject to review on merits if COA was issued, ineffectiveness prevalent counsel clearly deficient deprived Weil of fair trail.

VI. Did A Beholden, Bias Court Violate Weil's Constitutional Right To Fair Trial, Due Process, Was Recusal of Judge Marcus Mandated?

Throughout, the court treated AUSA as a favorite daughter, giving her benefit of every doubt, refusing to even admonish her for witness and evidence tampering and conversion or seizure of defense $10,000 in front of jury or refusing to provide the 24 missing tapes withheld of exculpatory

conversations; allowed admittance of altered, audio-erased videotape in which neither Weil nor Garber was present and had agent give his slanted version of "what was being said" via his annotations while AUSA own witness was on the stand; refused to sever Weil from Garber, causing Weil to be tainted by spillover effect; struck public authority defense which counsel did not reveal to Weil until after trial commenced; complimented AUSA after all bad faith and unclean hands acts, record at sentence shows court telling AUSA her "reputation precedes you" and that it "greatly respects her interpretation of law" and justice; refused missing witness instructions; gave jury incorrect charges, helpful to AUSA case; wrongfully enhanced Weil on facts not charged and not proven to a jury and even though AUSA did not request enhancement pre-trial nor file the mandatory §851; refused to admit Weil's hand notes (Def .Ex.8,9) as next best evidence in absence of missing#302,since FBI agent testified #302 was made from Weil's information and notes, jury deprived of them; refused admittance of both Bodden's and From's affidavits submitted to counsel before AUSA tampered with him, cajoled, intimidated and coerced him not to testify; refused one day continuance for defense to video tape Bodden deposition at his home after he left Miami per AUSA tampering; quashed ex-reporter's subpoena; gave AUSA three and one half weeks to put on her case when she only requested one week, then limited defense to two and one half days to put on its entire case as the court being out of time.

In §2255 proceedings court: refused motion for copy of altered, audio absent videotape which AUSA failed to provide on discovery, sprung it at trial, in

order that Weil could not have it electronically enhanced to recover the erased sound track; refused motion to take deposition of key AUSA trial agent who was subsequently charged with perjury in a matter related to this case; refused motion to allow Weil to review the court files of AUSA witness Matalon, who fled the country after verdict, whose files were sealed and which the court unsealed when he became a fugitive, many of which affect his trial perjured testimony and are public record, but court refused Weil access. Everything AUSA offered at trial, her witnesses, tapes videotape, indictment, were all tainted, but which the court ignored right through §2255 phase, granting her every possible advantage. Court refused to consider aggregate effect of prosecutorial misconduct. U.S. v. Francis, 170 F.3d 546, 552 (6th Cir. 1989). Particularly so when the mysterious disappearance of exculpatory #302 and the 24 missing tapes requested by defense were in Respondent's sole custody, control and possession. Const. Law § 840; 33 ALR 2d 1421. Brady, Banks, and Strickler, supra.

The pervasive bias continued on appeal, Hon. Judge Marcus erred in not recusing himself pursuant to 28 USC §455(a), (b)(1) and (b)(3), having expressed an opinion concerning the merits of this case on two prior occasions. §455(a) mandates recusal as non discretionary. See pg. 3-4 of this Petition. Liteky, 485-487, Weil had every right to "prevent his future action in the pending cause." Ex Parte American Steel Barrel Co., 230 US 35 (1913). Record shows pervasive bias and abuse of discretion throughout, permeates the very essence of justice and law. Magistrate and AUSA both worked together for a decade in the same office as AUSA's, including during pendancy of this case, he is

now subordinate to her father; the judge at trial a new appointee looked to senior Judge King for guidance, his child case prosecutor; appeals Judge Marcus and Judge King practiced together in Miami as judges in the same Federal Courthouse for years, are close personal and family friends, **is uncontroverted**. The judicial deck stacked against Weil from inception, §458 enacted to prevent.

Judicial Bias affects substantial rights, this Court unanimously holding "trial before an unbiased judge is essential to due process" Johnson v. Mississippi, 403 U.S. 212, 216 (1971); Bloom v. Illinois, 391 U.S. 194 (1968). Court denied evidentiary hearing on disputed material facts, contrary to Supreme Court precedent that such §2255 hearing must be held. Machibroda v. U.S., 368 U.S. 487(1962). The record here is *res ipsa loquitor*, has been fully developed, is prima facie for COA, district court refused COA for appeal, refusing to recognize its own errors, even includes the four versions of suppressed indictment brought to its attention in pleadings below as well as its own misstatement as to Garber being in the highly prejudicial video which should have been inadmissible. Court instructing jury to use uncrossed testimonial tapes of AUSA witness she refused to produce is just further evidence of its bias mindset, Crawford, supra; Ogan v. Cockerell, 279 F.3d 349 (5th Cir. 2002), the Court stated the established principle:

"Doubts regarding the propriety of issuance of a certificate of appealabliltiy under the Anti-Terrorism and Effective Death Penalty Act (AEDPA) should be resolved in favor of habeas petitioner"

CONCLUSION

The enormous amount of uncontroverted facts in this case are unparalleled in the annals of the criminal justice system. Respondent has desecrated Weil's constitutional rights, violated clear federal law and cast aside all ethics that government is required to abide by. The case is "debatable among jurists of reason," COA denial threatens fundamental notions of due process and liberty. Certiorari review is required to illuminate the darkness of non-accountability, AUSA impunity, unfettered prejudice and to correct the gross imbalance and restore fairness to this manifest injustice by vacating the verdict.

Respectfully submitted,

Steve Weil
STEVE WEIL, pro-se
#11615-004
Federal Prison Camp
P.0. 779800 Miami
Florida 33177-0200

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 04-10199-C

STEVE WEIL,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

[Entered: May 6, 2004]

ORDER:

To merit a certificate of appealability, appellant must show that reasonable jurists would find debatable either (1) the merits of a constitutional claim or (2) both the merits of an underlying claim and the procedural issues he seeks to raise with respect to that claim. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel. 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000). Appellant has failed to satisfy either test set forth above. Accordingly, appellant's motion for a certificate of appealability is DENIED.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 04-10199-C

STEVE WEIL,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

[Entered: June 29, 2004]

ORDER:

Appellant's motion seeking the undersigned's recusal having been accepted and filed, Appellant's motion to order the Clerk to file the recusal motion is DENIED AS MOOT.

Appellant's motion seeking the undersigned's recusal is DENIED. See U.S. v. Greenough. 782 F.2d 1556, 1558 (11th Cir. 1986).

Appellant's motion for reconsideration will be addressed by separate order.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 04-10199-C

STEVE WEIL,

Petitioner – Appellant,

versus

UNITED STATES OF AMERICA,

Respondent – Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

[Entered: July 2, 2004]

Before TJOFLAT and MARCUS, Circuit Judges

Upon reconsideration of this Court's order dated May 6, 2004, appellant's motion for a certificate of appealability is DENIED because appellant has failed to make the requisite showing. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604, 146 L. Ed. 2d 542 (2000); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Cunningham v. Zant. 928 F.2d 1006, 1013 (11th Cir. 1991); United States v. Wilson, 894 F.2d 1245, 1253-54 (11th Cir. 1990). Appellant has failed to offer any evidence of judicial bias against him, which cannot be based on the mere fact that a colleague's daughter prosecuted appellant's criminal case. See Liteky v.

United States, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157, 127 L. Ed. 2d 474 (1994) ("opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible").

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W. Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

[Entered: August 19,2004]

Steve Weil, #11615-004
Federal Prison Camp
P.O. Box 779800 Miami,
FL 33177-0200

Appeal Number: 04-10199-C
Case Style: Steve Weil v. USA
District Court Number: 02-23671 CV-PAS

Your "Petition for en banc consideration of denial of motion for issuance of the certificate of appealability by this court in totally ignoring precedent of Supreme Court in *Blakelv v. Washington*" has been received by this office and is being returned to you unfiled according to 11th Cir. R. 35-3. A copy is enclosed for convenience.

Sincerely,
THOMAS K. KAHN, Clerk

/s/ Sheran P. Taylor
Sheran P. Taylor (404) 335-6183
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 02-23671-CIV-SEITZ\WHITE
98-866-CR-SEITZ

STEVE WEIL,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

[Entered: January 2, 2004]

FINAL JUDGMENT ON MOTION TO VACATE

For the reasons stated in the Report and Recommendation of Magistrate Judge White and upon independent review of the file, and noting the Movant's objections and finding no meritorious support for them, it is

ORDERED and ADJUDGED as follows:

1. This motion to vacate is DENIED.

2. All pending motions are DENIED as MOOT. This CASE is CLOSED.

ORDERED at Miami, Florida this 31st day of December, 2003.

/s/Patricia A. Seitz
PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE

Copies to:

Jena King, AUSA, U.S. Attorney's Office, 99 N.E. 4th Street, Miami, FL 33132

Steve Weil, *pro se*, Reg. No. 11615-004, FPC-Miami, P.O. Box 779800, Miami, FL 33177-0200

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-23671-Civ-Seitz
(98-866-Cr-Seitz)

MAGISTRATE JUDGE P. A. WHITE

STEVE WEIL,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

[Entered: November 26, 2003]

REPORT OF MAGISTRATE JUDGE

Steve Weil has filed a pro se motion to vacate pursuant to 28 U.S.C. §2255, attacking his convictions and sentence for money laundering offenses entered following a seventeen day jury trial in Case No.98-866-Cr-Seitz.

This case has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2255 Proceedings in the United States District Courts. The Court has reviewed the motion and the movant's accompanying pleadings, the government's response, the PSJ, and all pertinent portions of the underlying criminal file.

Weil raises the following claims:

1. The government tampered with a key defense witness and improperly caused the witness not to testify.

2. The government altered tapes, and failed to provide the defense with exculpatory tapes and phone records.

3. The government concealed an exculpatory FBI memorandum from the defense.

4. He received ineffective assistance of counsel for over fifty (50) reasons.

5. The government improperly deprived him of counsel during his attempt to obtain a Fed.R.Crim.P. 35(b) motion for reduction of sentence.

6. The indictment was defective and improperly amended during trial.

7. The prosecution of his case by AUSA Jena King violated 28 U.S.C. §§458 and 460, and divested the Court of jurisdiction.

8. The Assistant United States Attorney engaged in numerous instances of prosecutorial misconduct.

9. The jury was not representative of his peers because there were no white, American-born, Jewish members.

10. The PSI was incorrect, and the Court improperly sentenced him.

11. The government's witness attempted to extort money from him to testify truthfully at trial.

12. The court erred by failing to sever his trial from codefendant Garber.

13. He received ineffective assistance of appellate counsel for various reasons.

14. The Court was biased against him.

Weil was charged for his involvement in a money laundering scheme. At trial, he argued that he wan actually attempting to make a case for the FBI, as he had been a long time informant. The jury, however rejected this defense, and convicted him of one count, of conspiracy to launder property represented by a law enforcement officer as drug trafficking proceeds and two charges of conducting and attempting to conduct financial transactions designed to conceal and disguise property represented by a law enforcement officer to be drug trafficking proceeds. On October 6, 2000, Weil was sentenced to 83 months imprisonment.

Weil appealed, asserting that the district court erred in: 1) refusing to give a public authority theory of defense instruction; 2) resolving various evidentiary

rulings and denying his motion for mistrial; 3) its delivery on an Allen[1] charge to the jury; and also, 4) that the evidence was insufficient to support his convictions. On November 15, 2001, the Court of Appeals affirmed the judgment. The Supreme Court denied his petition for writ of certiorari on April 1, 2002. Meanwhile, Weil had filed a motion to compel the government to file a Fed.R.Crim.P. 35 motion for reduction of sentence. The Court denied it, and Weil appealed. The denial was affirmed on July 31, 2002. This timely motion to vacate pursuant to 28 U.S.C. §2255 ensued.

Claim One

Weil asserts that the government tampered with a key defense witness, Cliff Bodden, and improperly caused him not to testify. He claims that the prosecutor and IRS agent improperly met with Bodden the day before the trial and convinced him not to testify for the defense. He contends that the government arranged an "undisclosed deal" not to prosecute Bodden in return for his promise to return $15,000 that he had taken, and to leave town immediately without testifying.

While Weil asserts that he "recently learned" of this alleged undisclosed deal, he offers nothing to support this conclusory assertion. Notably, he has an affidavit from Bodden regarding his proposed testimony, yet nothing about the alleged secret

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[1] In an Allen charge, the judge instructs a deadlocked jury to undertake further efforts to reach a verdict. Allen v. United States, 164 U.S. 492 (1896); United States v. Chiqbo, 38 F.3d 543, 544 n.l (11 Cir. 1994).

negotiations, in spite of the fact that Weil testified at trial that Bodden told him the government had prevented him from testifying.[2] (CR/DE# 332 at 63). Bare and conclusory allegations which contradict the existing record and are unsupported by affidavits or other indicia of reliability, are insufficient to require a hearing or further consideration. See: Tejada v. Dugger, 941 F.2d 1551, 1559 (11 Cir. 1991), cert. denied, 502 U.S. 1105 (1992) (a petitioner is not entitled to habeas corpus relief when his claims are merely conclusory allegations unsupported by specifics or in the face of the record are wholly incredible). See also Ferguson v. United States, 699 F.2d 1071 (11 Cir. 1983), United States v. Ammirato, 670 F.2d 552 (5 Cir. 1982); United States v. Sanderson, 595 F.2 1021 (5 Cir. 1979); King v. United States, 565 F.2d 356 (5 Cir. 1978); Clayton v. Estelle, 541 F.2d 486 (5 Cir. 1976).

Moreover, even assuming the government spoke with Bodden, who in turn decided it would not be in his best interest to testify, Weil cannot show that he was prejudiced by Bodden's failure to testify. Bodden's affidavit would not have exculpated Weil, but rather would have explained to whom Weil gave the money. Moreover, Bodden's conclusory assertion that the funds he received from Weil were not proceeds of any illegal activity was actually incorrect, and would have been refuted at trial.

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[2] Defense counsel subsequently admitted that he had no evidence that the government tampered with the witness or otherwise prevented Bodden from testifying, and the prosecutor proffered the conversation between the agent and Bodden, during which Bodden stated that he would not be a good defense witness because of subsequent problems with Weil. (CR/DE# 332 at 81 84).

Claim Two

Weil asserts that the government altered some audiotapes, and failed to provide the defense with other, exculpatory audiotapes and phone records. He argues that these missing tapes and records would have established that the agents assured him the money he was going to launder was not from drugs, and would have proven that he was entrapped.

In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court established three criteria a criminal defendant must prove in order to establish a violation of due process resulting from the prosecution's withholding of evidence: (1) that the prosecution suppressed evidence, (2) that the evidence suppressed was favorable to the defendant or exculpatory, and (3) that the evidence suppressed was material. United States v. Severdija, 790 F.2d 1556, 1558 (11 Cir. 1986). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Stewart, 820 F.2d 370, 374 (11 Cir. 1987), quoting, United States v. Baqley, 473 U.S. 667, 682 (1985).

First, Weil offers nothing but his conclusory allegations that the these missing tapes exist. Second, the main focus of his defense at trial was not entrapment or lack of knowledge that the funds to be laundered were drug proceeds, but rather that he was intentionally breaking the law in his capacity as an informant for the FBI in order to make a case. Thus, these tapes, even assuming they do exist, would not have substantially helped his case. Moreover, they

would have been contradicted by the overwhelming evidence of his guilt. There is no reasonable probability that the disclosure of these tapes, if they even existed, would have resulted in an acquittal.

Claim Three

Weil asserts that the government concealed an exculpatory FBI memorandum from the defense. During the trial, defense witness John Toale, a former FBI agent who had supervised Weil in his capacity as an informant, testified that in March or April of 1997 Weil told him that he had been in contact with some individuals with ties to organized crime who were smuggling Cuban cigars. Toale testified that he may have written a 302 report, but was not able to find it. (CR/DE# 330 at 85, 90). However, he also testified that Weil never mentioned anything to him about money laundering or trying to make a case, and further testified that Weil was not the type of informant who was permitted to conduct an undercover investigation and carry out criminal activity. He further testified that he never gave Weil the authority to do so in this case.

There is nothing to indicate that the prosecution concealed a 302 FBI report from the defense, as Taole, the purported author, was not even positive that one had been written. Moreover, Toale was available to testify, and did so. Any information in the report would have been cumulative and hearsay. Weil has failed to establish that the government committed a Brady violation.

Claim Four

Weil asserts that he received ineffective assistance of counsel for over fifty reasons. In order to prevail on a claim of ineffective assistance of counsel, the movant must establish that 1) his counsel's representation fell below an objective standard of reasonableness; and 2) but for the deficiency in representation, there is a reasonable probability that the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). Thus, Weil must show that his counsel's performance was below constitutional standards, and that he suffered prejudice as a result. A court may decline to reach the performance prong of the standard if it is convinced that the prejudice prong cannot be satisfied. Id. at 697; Waters v. Thomas, 46 F.3d 1506, 1510 (11 Cir. 1995).

Each of Weil's subclaims of ineffective assistance of counsel has been reviewed, and will be briefly addressed in turn. The majority of the claims are patently frivolous or belied by the record, which reveals that counsel was a zealous and competent advocate for his client.

(1) Weil first asserts that counsel was ineffective for failing to file a motion for severance. This claim is belied by the record, which reveals that a motion to sever was filed. (CR/DES# 92).

(2) Next, Weil faults counsel for failing to "make an issue" of the missing 302 report to the jury. This claim is also refuted by the record, which reveals that counsel did make this argument to the jury. (CR/DE# 333 at 118-121).

(3) Weil asserts that counsel was ineffective for failing to argue that the prosecutor improperly initiated Weil's termination from the FBI. During trial, a supervisory special agent from the FBI testified that Weil's association with the FBI was terminated once it learned from the U.S. Attorney's Office and the DEA that Weil had engaged in unauthorized criminal activity and was about to be indicted. (CR/DE# 330 at 197). There was no suggestion that the prosecutor instructed the FBI to terminate Weil, or that she asked them not to inform him of his termination. There was no misconduct, and counsel was therefore not ineffective for failing to argue there was.

(4, 48) Weil asserts that counsel was ineffective for failing to call codefendant Garber to testify on his behalf. Although Weil asserts that Garber would not have invoked his Fifth Amendment right not to testify, and was willing to testify on Weil's behalf, he offers no affidavit from Garber to support this contention. It is extremely unlikely that Garber's lawyer would have allowed Garber to testify on behalf of a codefendant at a joint trial, and Weil's lawyer was not ineffective for failing to attempt to call Garber.

(5) Weil asserts that counsel was ineffective for failing to call codefendant Masocco as a witness. Again, Weil offers no evidence that Masocco, who pleaded guilty, would have been willing to testify on his behalf.

(6) Weil asserts that counsel was ineffective for failing to call former FBI Agent Sullivan as a witness. He asserts that Sullivan would have confirmed Toale's testimony that Weil had received

approval to work undercover in the money laundering schemes. Not only did Toale's testimony establish that Weil had not been approved to engage in illegal activities, but again, Weil presents no affidavit from Sullivan indicating the substance of his proposed testimony, or that he would have been willing to testify at all.

(7, 44) Weil asserts that counsel was ineffective for failing to call Russell Adler as a witness. He argues that counsel was in such a stupor on the last day of trial that he completely forgot to call him. As counsel explained during the sentencing hearing, he did not call Adler because the Court had limited the number of witnesses the defense could call regarding prior consistent statements. (CR/DE# 338 at 26). It was a strategic decision not to call Adler, not an oversight. The decision was not unreasonable; Adler testified at the sentencing hearing that Weil became upset during a meeting when he learned that Garber was still dealing with Paul from the Indian Tribe because he feared Paul was breaking the law (CR/DE# 338 at 29-38). This testimony would not have supported his defense that he was attempting to make a case for the FBI, and there is no reasonable probability the result of the trial would have been different had Adler testified during the trial.

(8) Weil asserts that counsel was ineffective because he forgot to ask defense witness Robert Lambert whether Weil had told him that he reported his undercover money laundering activities to the FBI. Counsel was not ineffective for failing to ask this question. First, a hearsay objection most likely would have been lodged and sustained. Second, were the

question and response allowed, the fact that Weil told Lambert that he, Weil, had reported the money laundering to the FBI does not prove that Weil did in fact provide the FBI with such information. In fact, that contention was refuted by Weil's own witness from the FBI, Toale.

(9) Weil asserts that counsel was ineffective for failing to subpoena the Chief of the Seminole Indian tribe to testify that an initial meeting between the government agents and the coconspirators at the Sheraton Hotel never took place. Weil does not provide an affidavit from the Chief detailing what his proposed testimony would have been, or whether he even would have been willing to testify. Moreover, disproving the occurrence of a meeting would not advance Weil's defense that he was acting on behalf of the FBI.

(10) Weil asserts that counsel was ineffective for failing to subpoena Bodden or Leo From to testify. As discussed above, supra, Weil was not prejudiced by Bodden's failure to testify. Review of From's affidavit indicates that he was unable to testify because he was out of the country celebrating Passover in Israel. While counsel certainly could have subpoenaed From, his failure to do so does not constitute ineffective assistance, as the substance of From's affidavit (DE# 1, Ex. A) was mainly conjecture, speculation, and hearsay. There is no reasonable probability that the result of the trial would have been different had From testified.

(11, 12) Weil asserts that counsel was ineffective for failing to either recall the IRS agent, or call the prosecutor to establish that the government

had coerced Bodden not to testify. As noted previously in this report, supra, there is nothing to support Weil's allegation of prosecutorial misconduct. Accordingly, counsel was not ineffective for failing to make a baseless allegation.

(13) Weil asserts that counsel was ineffective for failing to ask him on direct to explain the substance of the affidavits from From and Bodden. The content of the affidavits is hearsay, and any attempt to elicit that information from Weil would have failed. Counsel was not ineffective.

(14) Weil asserts that counsel was ineffective for failing to request an audibility hearing on the tapes. There was extensive argument regarding the transcripts, the tapes and their audibility. When the government attempted to introduce new versions of transcripts, counsel for both defendants vigorously objected, and argued that the original transcripts should stand. Weil's lawyer explained that he had analyzed the tapes with an expert, and although the quality was not very good, the transcripts which were originally provided accurately reflected the content of the tapes. (CR/DE# 319 at 12). Even if a tape has poor audibility, it is admissible if enough of the conversation is audible and relevant to the purposes for which it is being introduced. United States v. Greenfield, 574 F.2d 305 (5 Cir. 1978). Counsel was not ineffective for failing to request an audibility hearing because it is clear from the record, including counsel's admission, that the tapes were of sufficient quality to be introduced.

(15) Weil asserts that counsel was ineffective for failing to prevent the introduction of the second set of transcripts. Review of the record indicates that counsel argued vigorously to prevent the admission of the second version of the transcripts. Moreover, this argument was presented to the Eleventh Circuit on appeal, and rejected. Counsel was not ineffective for failing to succeed on a meritless argument.

(16) Weil asserts that counsel was ineffective for failing to question codefendant turned government witness Matalon about an alleged argument between Weil and Garber at Federal Detention Center Miami. Weil offers no supporting evidence of any such argument, or an affidavit from Matalon regarding whether he overheard the argument. Weil cannot demonstrate that he was prejudiced by counsel's failure to ask Matalon about the alleged argument.

(17) Weil asserts that counsel was ineffective for failing to object to the denial of a reduction of sentence for his acceptance of responsibility. Counsel argued vigorously against the government's request for an obstruction of justice enhancement based on what it considered to be perjured testimony. The Court declined to impose the enhancement, but found that Weil's testimony had not been credible, and that he "did not know what the truth is." (CR/DE# 338 at 54-55). Given that Weil has never accepted responsibility for his actions, but instead has consistently maintained that he was attempting to make a case for the FBI, there is absolutely no reasonable probability that the Court would have granted a reduction for acceptance of responsibility, and counsel was not ineffective for failing to request one.

(18) Weil asserts that counsel was ineffective for failing to file a motion to correct his sentence. As Weil presents no valid grounds for his sentence to be corrected, counsel was not ineffective for failing to file such a motion.

(19) Weil asserts that counsel was ineffective for failing to attack the sufficiency of the indictment. As will be discussed infra, there were no grounds upon which a challenge to the indictment would have succeeded at the time of trial. Accordingly, counsel was not ineffective.

(20) Weil asserts that counsel was ineffective for failing to attack the jury composition, and argue that the jury was not made up of his peers, but instead contained many women, who were unduly influenced by the Assistant United States Attorney's pregnancy. As will be discussed, infra, there wan no valid challenge to the jury to be made. Counsel was not ineffective.

(21) Weil asserts that counsel was ineffective for failing to file a motion for an expert to poll and interview the jurors at the conclusion of the trial. The jury was polled following the verdict, and indicated that its verdict was unanimous. Weil has demonstrated no prejudice from counsel's failure to request permission for his expert witness to speak with the jury.

(22) Weil asserts that counsel was ineffective for refusing to file the affidavits from Bodden and From. He argues that counsel failed to file them because it would have exposed his ineffectiveness for failing to secure them as witnesses or elicit the content

of the affidavits from Weil during his testimony. Weil has since filed the affidavits, and they have been reviewed by this Court in connection with Weil's claims of ineffectiveness. Weil suffered no prejudice from counsel's failure to file them earlier.

(23) Weil asserts that counsel was ineffective for failing to challenge his criminal history category at sentencing. Weil argues that one of his prior convictions should have been expunged by the FBI, because he plead guilty to the charge only to maintain his cover, and faults counsel for failing to raise this argument at sentencing. Because Weil has produced nothing to support his assertion, he cannot demonstrate that this argument would have been successful. Counsel was not ineffective for failing to raise it.

(24-26, 31-33, 37, 42, 43, 45) Weil asserts that counsel's performance during closing arguments was deficient because he omitted key arguments and failed to request more time. A thorough review of Weil's litany of complaints and the transcript of counsel's closing argument reveals that counsel's performance was more than constitutionally adequate. None of the alleged errors about which Weil complains, taken either separately or together create a reasonable probability that but for those alleged errors, the result of the trial would have been different.

(27) Weil asserts that counsel was ineffective for failing to obtain a jury instruction on missing witnesses. Counsel did request the instruction, and Weil presents no persuasive argument that counsel

should have made but did not. (CR/DE# 170, CR/DE# 331 at 291).

(28, 34, 38-39) Weil asserts that counsel was ineffective for failing to argue that the government acted unprofessionally and gained favor with the jury because of the Assistant United States Attorney's pregnancy. He accuses the case agent of making faces and gestures to the jury, and the prosecutor of currying favor with both the judge and the majority of the jurors as they were women and could relate to her condition. These claims are bereft of support, and Weil was not prejudiced by counsel's failure to raise them.

(29) Weil asserts that counsel should have produced airline tickets to refute a government witness's testimony that Weil never traveled internationally on behalf of the FBI. It was argued by the defense that Weil did travel overseas on behalf of the FBI. Ticket stubs would not have confirmed Weil's position that the travel was on behalf of the FBI, but only that the travel had taken place. There was no prejudice from counsel's failure to introduce the tickets.

(30) Weil asserts that counsel was ineffective for failing to argue that Weil had as active file on which he was working for the FBI at the time of the trial. That argument would not have resulted in a different result, and counsel was not ineffective for failing to make it.

(35) Weil asserts that counsel was ineffective for failing to object to the Court permitting the government nearly three weeks to present its case, but allowing the defense only two days. The record reflects that the Court allowed all parties ample time to

present their cases. Any objection would not have succeeded.

(36) Weil asserts that counsel was ineffective for failing to file a motion for a new trial based on the "missing witnesses" and on other grounds argued in this motion. As none of the grounds would have succeeded, counsel was not ineffective for failing to file such a motion.

(40) Weil asserts that both his lawyer and a member of the Court's staff prevented him from speaking personally with the Judge about the problems he was having with counsel. He complains that his lawyer pressed him for more money during the trial, which caused a rift between them. It is clear from reviewing the record that any fee dispute between Weil and his lawyer did not effect the caliber of representation he received; counsel's performance throughout was more than constitutionally adequate.

(41) Weil asserts that counsel was completely ineffective during sentencing. As is discussed later in this report, Weil was properly sentenced, and counsel was not ineffective.

(46, 47) Weil asserts that counsel was ineffective for failing to object more strenuously to the government's seizure of $10,000 in the courtroom during trial and explain to the Court that Weil had marked and saved the money to use as evidence. This claim is without merit. During his testimony at trial, Weil presented the money, and explained that he had marked and copied the bills to be used as evidence in the case he was attempting to make. (CR/DE# 331 at 88-89). The money was moved into evidence, and the

government announced that it would be seized because it was drug money. (Id.). The government took the money, defense counsel objected, and the Court directed the parties to keep their focus on the trial. Counsel later moved for a mistrial, and the Court agreed that the government's comment was inappropriate, but denied the motion for mistrial. Instead, the Court instructed the jury that evidence such as drugs or money is normally kept by a law enforcement officer for proper safekeeping, but in this case returned it to defense counsel. (DE# 331 at 103-104). The record reflects that counsel vigorously objected to the "seizure," and ultimately gained custody of the funds. Moreover, the Court's denial of the motion for mistrial was affirmed on appeal. (See DE# 16, Ex. A, Ex. B). Counsel was not ineffective.

(49) Weil asserts that counsel was ineffective for failing to file a Rule 35 motion to correct his sentence. As there were no grounds upon which such motion would have succeeded, counsel was not ineffective for declining to file one.

(50) Weil asserts that counsel was ineffective for failing to secure a written cooperation agreement from the government. Counsel could not have forced the prosecution to enter into such an agreement; the government has "a power, not a duty" to file a downward departure motion when a defendant has substantially assisted the government in its investigation or prosecution of other offenses. United States v. Wade, 504 U.S. 181, 185 (1992). As the Eleventh Circuit determined on appeal of Weil's motion to compel the government to make a substantial assistance motion, there was no showing of

an unconstitutional motive in the government's failure to file a Rule 35(b) motion.

(51) Weil asserts that counsel was ineffective for failing to properly prepare for trial, and argues that his lawyer was not fit to try it. The record refutes both of these allegations.

(52, 53) Weil asserts that counsel was ineffective for abandoning him after sentencing, and faults him for not providing him with any representation during his attempt to secure a Rule 35(b) motion. As the Eleventh Circuit held when rejecting this claim on appeal, a criminal defendant does not have the right to counsel in a Rule 35(b) proceeding. (CR/DE# 426 at 9).

Claim Five

Weil asserts that the government improperly deprived him of counsel during his attempt to obtain a Fed.R.Crim.P. 35(b) motion for reduction of sentence. This claim was raised in Weil's appeal of that motion, and rejected by the Eleventh Circuit. He asserts no change in the law or circumstances that would justify reconsideration. An issue resolved against a movant on direct appeal cannot be relitigated in a §2255 motion absent an intervening change in the law. United States v. Frady, 456 U.S. 152, 166-168 (1982); Dermota v. United States, 895 F.2d 1324 (11 Cir. 1930), cert. denied, 498 U.S. 837 (1990); United States v. Johnson, 615 F.2d 1125, 1128 (5 Cir. 1980). This claim is procedurally barred.

Claim Six

Weil asserts that the indictment was defective and improperly amended during trial. He argues that although he was only charged in the first three counts, he was sentenced based on the conduct which occurred in the last three, for which he was not convicted. This claim was raised and rejected on appeal, and Weil is barred from re-litigating it in this proceeding. United States v. Frady, supra.

Claim Seven

Weil asserts that the prosecution of his case by AUSA Jena King, the daughter of a sitting District Court Judge in the Southern District of Florida, violated 28 U.S.C. §§ 458 and 460, and divested the Court of jurisdiction. While the relative of a judge is prohibited from being employed in the same court, the plain language of the statutes make it clear that the prohibition is limited to the judicial branch, and does not extend to the executive branch. The prosecution by AUSA King did not violate any laws or deprive the District Court of jurisdiction.

Claim Eight

Weil asserts that the Assistant United States Attorney engaged in numerous instances of prosecutorial misconduct. He makes a litany of complaints, most of which he raised elsewhere in his motion. Each of Weil's allegations has been reviewed, and they are either refuted by the record, plainly without merit, or procedurally barred.

Claim Nine

Weil asserts that the jury was not representative of his peers because there were no white, American born, Jewish members.

An assertedly discriminatory selection of a jury venire may be challenged under the Sixth Amendment requirement that the venire reflect a fair cross-section of the community. Duren v. Missouri, 439 U.S. 357 (1979). To establish a prima facie violation of the cross-section requirement, a petitioner must show 1) that the under- represented group is a distinctive group in the community, 2) that the group's under-representation is not fair and reasonable in relation to the group's number within the community, and 3) that the under-representation is due to the systematic exclusion of the group from the jury selection process. Duren, supra, at 364. Weil has made no such showing.

Discriminatory selection of jury venires may also be challenged under the equal protection clause of the Fourteenth Amendment. Castaneda v. Partida, 430 U.S. 482 (1977). To establish a prima facie case for an equal protection violation, a petitioner must show 1) that he is a member of a group capable of being singled out for discriminatory treatment, 2) that members of this group were substantially under-represented on the venire, and 3) that the venire was selected under a practice which provided an opportunity for discrimination. Castaneda, supra, at 494.

However, an equal protection violation cannot be established solely by a showing that a particular group was under-represented in the jury venire. Cunningham v. Zant, 928 F.2d 1006, 1014 n. 9 (11 Cir.

1991). Where there has been no showing that the venire was selected pursuant to a practice that provided an opportunity for discrimination, no equal protect ion claim will lie. Cunningham, supra. In this case, Weil argues that there wan not a representative number of American born Jewish individuals on his jury panel. This bare assertion simply fails to establish that the venire was selected pursuant to a practice that permits, let alone encourages discrimination.

Claim Ten

Weil asserts that the PSI was incorrect, and caused him to receive an improper sentence. Interspersed among his diatribe against the prosecutor, whom he asserts received numerous gifts for the birth of her child, the grandchild of Judge King, and improperly influenced every person even remotely connected to his case, Weil argues that: a) the PSI improperly attributed a loss of $420,000 as opposed to $165,000; b) he should have received credit for acceptance of responsibility; and c) his criminal history category should have been level two, not level three. He also complains that the Court did not take seriously his 52 letters of support, permit him to call all 16 of his character witnesses, or grant a downward departure due to his medical condition.

None of these contentions have merit. The issue of how much money should have been attributed to Weil was raised on appeal, and the Court's ruling was affirmed. It may not be relitigated now.

With regard to the other claims, the Court properly denied them. First, Weil's request for a reduction for acceptance of responaibi1ity has no merit,

as his argument that he intentionally committed the crime in order to make a case for the FBI does not evince an acceptance and acknowledgment that he was guilty, but instead is a restatement of his defense, which was rejected. Second, he offers nothing to support his argument that his criminal history category was overstated.

Within this claim, Weil raises the unrelated assertion that the Court improperly read an Allen charge to the jury. This claim was raised and rejected on appeal, and is barred from reconsideration here.

Claim Eleven

Weil asserts that the government's witness attempted to extort money from him to testify truthfully at trial. He argues that Ely Matalon, codefendant turned government witness, requested $50,000 from him prior to trial, and Weil's family boat after trial, to provide truthful testimony which would have exculpated Weil. Weil explains that because he refused to pay Matalon, believing that to do so would have been illegal, Matalon did not testify about certain exculpatory conversations between Weil and codefendant Garber. Weil offers no support for this contention whatsoever. Bare and conclusory allegations which contradict the existing record and are unsupported by affidavits or other indicia of reliability, are insufficient to require a hearing or further consideration. See: Tejada v. Dugger, 941 F.2d 1551, 1559 (11 Cir. 1991), cert. denied, 502 U.S. 1105 (1992).

Claim Twelve

Weil asserts that the court erred by failing to sever his trial from codefendant Garber. Counsel filed a motion for severance (CR/DE# 92) which the government opposed. (CR/DE# 94). A report was issued by the Honorable Ted E. Bandstra, United States Magistrate Judge, recommending the motion for severance be denied (CR/DE# 100) was adopted by the District Court. (CR/DE# 145). Weil has not demonstrated that the Court's ruling was erroneous.

The general rule is that coconspirators should be tried jointly. United States v. Sawyer, 799 F.2d 1494 (11 Cir. 1986); United States v. Esle, 743 F.2d 1465, 1476 (11 Cir. 1984)(quoting United States v. Berkowitz, 662 F.2d 1127, 1132 (5 Cir. Unit B 1981). In order to justify severance, it must be demonstrated that the movant would suffer compelling prejudice against which the trial court was unable to afford protection. Sawyer, supra. Given the strength of the evidence against Weil, and Weil's testimony that he directed codefendant Garber's actions in his dealings with Matalon, Weil has not shown he was prejudiced by the joint trial.

Claim Thirteen

Weil asserts that he received ineffective assistance of appellate counsel for various reasons.

The standard for a claim of ineffective assistance on direct appeal is the same as that for ineffective assistance at trial. Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987). There is no duty to raise issues on appeal which have little or no chance of success; appellate counsel is not required to raise meritless

issues, Card v. Dugger, 911 F.2d 1494, 1520 (11 Cir. 1990), or issues which were not preserved and are procedurally barred on appeal, Bertolotti v. Dugger, 883 F.2d 1503, 1523 (11 Cir. 1989), cert. denied, 497 U.S. 1032 (1990); Jackson v. Dugger, 931 F.2d 712, 715 (11 Cir. 1991).

Weil asserts that counsel was ineffective for failing to raise the issues presented in this motion, and for inadequately arguing those which were raised. The issues raised in this motion would not have succeeded had they been raised on appeal. His remaining complaints are rambling allegations which warrant no further consideration.

Claim Fourteen

Weil asserts that the Court was biased against him, which was evident due to it "displaying an unyielding propensity to go along with whatever AUSA argued. . . [in a] one-sided, lopsided case of extreme conduct and events by a renegade mean spirited AUSA Judge's daughter, whose spite, ego and arrogance was permitted to prevail from the beginning of this unfortunate case." Weil essentially argues that every adverse ruling was the result of the Court's bias and prejudice against him, and again rehashes his litany against the prosecutor.

This claim is plainly without merit. The record reveals that the Court was fair and impartial throughout the proceedings.

Conclusion

It is therefore recommended that the motion to vacate be denied. Objections to this report may be filed

with the District Judge within ten days of receipt of a copy of the report.

Signed this 25th day of November, 2003.

/s/
UNITED STATES MAGISTRATE JUDGE

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